

**United States Bankruptcy Court
Central District of California
Los Angeles
Ernest Robles, Presiding
Courtroom 1568 Calendar**

Tuesday, May 2, 2023

Hearing Room 1568

10:00 AM

2:22-10132 Phenomenon Marketing & Entertainment, LLC

Chapter 11

#1.00 HearingRE: [366] U.S. Trustee Motion to dismiss or convert or Direct the Appointment of a Chapter 11 Trustee . (Attachments: # 1 COS)(united states trustee (hy))

Docket 366

Tentative Ruling:

5/1/2023

Note: Parties may appear at the hearing either in-person or by telephone. The use of face masks in the courtroom is optional. Parties electing to appear by telephone should contact CourtCall at 888-882-6878 no later than one hour before the hearing.

For the reasons set forth below, the Court will enter a continuing compliance order against the Debtors as requested by the UST.

Pleadings Filed and Reviewed:

- 1) United States Trustee's Notice of Motion and Motion Under 11 U.S.C. § 1112(b) to Dismiss, Convert, or Direct the Appointment of a Chapter 11 Trustee [Doc. No. 366] (the "Motion")
- 2) Debtor's Opposition to United States Trustee's Motion to Dismiss, Convert, or Direct the Appointment of a Chapter 11 Trustee [Doc. No. 380] (the "Opposition")
- 3) United States Trustee's Reply to Opposition to United States Trustee's Motion to Dismiss, Convert, or Direct the Appointment of a Chapter 11 Trustee [Doc. No. 381] (the "Reply")

I. Facts and Summary of Pleadings

On January 10, 2022, Phenomenon Marketing & Entertainment, LLC ("Phenomenon") filed a voluntary Chapter 11 petition and elected treatment under Subchapter V. On February 9, 2022, Phe.No LLC ("Phe.No," and together with Phenomenon, the "Debtors") filed a voluntary Chapter 11 petition and elected treatment under Subchapter V. On August 30, 2022, the Court entered an order providing that the Debtors' cases would be jointly administered.

On April 28, 2022, the Court entered a Memorandum of Decision [Doc. No. 143]

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and accompanying order [Doc. No. 144] finding that Phenomenon was not eligible to proceed either as a Subchapter V debtor or as a small business debtor. Subsequent to the enactment of the *Bankruptcy Threshold Adjustment and Technical Corrections Act*, which modified the eligibility requirements for Subchapter V, the Court reinstated the Debtor's eligibility to proceed under Subchapter V. *See* Bankr. Doc. Nos. 214–15.

The United States Trustee (the "UST") moves to convert Phenomenon's case to Chapter 7, based upon Phenomenon's failure to pay quarterly fees during the time period when Phenomenon was not proceeding under Subchapter V. Subsequent to the filing of the Motion, the Debtor made \$22,444.17 to the UST on account of outstanding quarterly fees. In its reply papers, the UST requests that the Court enter a continuing compliance order, based upon the delinquency of Phenomenon's March 2023 Monthly Operating Report. On April 25, 2023, Phenomenon filed its March 2023 Monthly Operating Report.

II. Findings of Fact and Conclusions of Law

Section 1112(b) provides that the Court, upon request of a party in interest, "shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate." Section 1112(b)(4) contains a nonexclusive list of factors that constitute cause for dismissal or conversion. The factors set forth in §1112(b)(4) "are not exhaustive, and 'the court will be able to consider other factors as they arise, and to use its equitable powers to reach an appropriate result in individual cases.'" *Pioneer Liquidating Corp. v. United States Trustee (In re Consol. Pioneer Mortg. Entities)*, 248 B.R. 368, 375 (B.A.P. 9th Cir. 2000), *aff'd*, 264 F.3d 803 (9th Cir. 2001).

Local Bankruptcy Rule ("LBR") 2015-2(a)(1) provides: "The ... debtor in possession ... must timely provide the United States Trustee with financial, management and operational reports, and such other information requested by the United States Trustee pursuant to the *Guidelines and Requirements for Chapter 11 Debtors in Possession* as necessary to properly supervise the administration of a Chapter 11 case." Debtors are under a continuing obligation to comply with all requirements imposed by the UST. Failure to timely comply is grounds for dismissal or conversion. If debtors do not timely submit the required information, the UST cannot effectively carry out its oversight responsibilities under 28 U.S.C. § 586. There

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is nothing in the statute that says that debtors may ignore their compliance obligations until receiving a warning from the UST. The UST's office does not have the resources to monitor every single Chapter 11 debtor-in-possession with respect to their reporting and compliance obligations. By commencing a Chapter 11 petition, the Debtor voluntarily accepted the responsibility of complying with all applicable laws and regulations, including reporting obligations imposed by the UST's office.

Because Phenomenon did not comply with the UST's requirements until after the filing of the Motion, and to insure that Phenomenon continues to remain in compliance, the Court will enter the continuing compliance order requested by the UST. Because the cases of Phenomenon and Phe.No are jointly administered, the continuing compliance order will apply to both Debtors.

III. Conclusion

Based upon the foregoing, the Court will enter a continuing compliance order against the Debtors as requested by the UST. Within seven days of the hearing, the UST shall submit the continuing compliance order.

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Evan Hacker or Daniel Koontz, the Judge's Law Clerks, at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Party Information

Debtor(s):

Phenomenon Marketing &

Represented By
Michael Jay Berger

Trustee(s):

Susan K Seflin (TR)

Pro Se

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2:22-13500 Moussa Moradieh Kashani

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#2.00 Hearing
RE: [210] Motion To Deem Unsecured Claim As Timely Filed

Docket 210

Tentative Ruling:

5/1/2023

Note: Parties may appear at the hearing either in-person or by telephone. The use of face masks in the courtroom is optional. Parties electing to appear by telephone should contact CourtCall at 888-882-6878 no later than one hour before the hearing.

For the reasons set forth below, the Opposition is **OVERRULED** and the Motion is **GRANTED**. The Claim shall be treated as a timely filed general unsecured claim.

Pleadings Filed and Reviewed:

- 1) Bronzетree Terraces, LLC and AMG Private Custody Services, Inc. Notice of Motion and Motion to Deem Unsecured Claim as Timely Filed [Doc. No. 210] (the "Motion")
- 2) Debtor's Opposition to the Motion [Doc. No. 225] (the "Opposition")
- 3) Bronzетree Terraces, LLC and AMG Private Custody Services, Inc. Reply to the Opposition [Doc. No. 229] (the "Reply")

I. Facts and Summary of Pleadings

On June 24, 2022 (the "Petition Date"), Moussa Moradieh Kashani (the "Debtor") filed a voluntary Chapter 11 petition. Bronzетree Terraces, LLC and AMG Private Custody Services, Inc. (collectively, the "Movants") provided a loan to Summit, Inc. ("Summit"), which was personally guaranteed by the Debtor.

Per the Motion, the Debtor did not list the Movants as creditors and the Movants were not included in the mailing matrix. On November 15, 2022, the Debtor served a notice of the bar date, which was set as December 15, 2022 (the "Bar Date"); however, the Movants were not served with notice of the Bar Date. On March 28, 2022, the Movants filed a claim for \$195,015.00 (the "Claim").

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The Movants have filed the Motion for an order deeming the Claim as being timely filed. The Movants contend that the first time they became aware of the bankruptcy case was in March 2023. The Movants argue that as they were not provided with actual notice of the Bar Date, the Claim should be treated as being timely filed.

The Opposition

The Debtor contends that the Movants had notice of the Debtor's bankruptcy case because the Movants actively participated in the simultaneous Chapter 11 bankruptcy case filed by Summit, whose sole managing member is the Debtor, and a cursory review of the docket in the Summit case would have put the Movants on notice of the Debtor's case. Therefore, the Debtor claims that the Movants had constructive and/or inquiry notice of the Debtor's case, the Bar Date, and the understanding that their claim against the Debtor, as guarantor, could be affected.

The Debtor also asserts that the Movants cannot meet the standard for excusable neglect, which requires the consideration of prejudice to the Debtor, length and reason of the delay in filing the claim, and the potential impact on the case, to allow the late filed claim.

Additionally, the Debtor maintains that if the Motion is granted and the Claim is deemed to be timely filed, the upcoming Confirmation Hearing on the Debtor's plan of reorganization, which is scheduled for May 31, 2023 (the "Plan Deadline"), will be jeopardized. After conducting hearings on six motions seeking dismissal or conversion of the Debtor's case, the Court issued an order [Doc. No. 119] fixing the Plan Deadline to confirm a plan of reorganization. If the Debtor fails to obtain an order confirming a plan of reorganization by the Plan Deadline, which will not be extended absent exceptionally compelling circumstances, the case will be converted to Chapter 7 without further notice or hearing. The Debtor contends that the Claim is of significant value and puts the Debtor's plan of reorganization at risk.

The Reply

The Movants assert that the Debtor's reliance upon *In re Coastal Alaska Lines, Inc.*, 920 F.2d 1428 (9th Cir. 1990) ("*Coastal*") is mistaken as it is applicable in the Chapter 7 context, whereas *In re Maya Construction Company*, 78 F.3d 1395 (9th Cir. 1996) ("*Maya*") applies in a Chapter 11 case. The court in *Maya* found that actual notice of the claim bar date must be served on the debtor's creditor. Therefore, as they were admittedly not served with notice of the Bar Date, the Movants should prevail

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and the Claim should be deemed timely filed.

The Movants contend that they do not need to show excusable neglect, including lack of prejudice, because all that must be shown is the Debtor's failure to serve notice of the Bar Date on the Movants, which the Debtor has admitted to.

II. Findings of Fact and Conclusions of Law

A. The Claim Does Not Affect the Debtor's Upcoming Confirmation Hearing

The Debtor contends that the Claim puts the Debtor's ability to obtain an order confirming a plan of reorganization by the Plan Deadline at risk. Per the Debtor's First Amended Disclosure Statement Describing Debtor's Chapter 11 Plan of Reorganization [Doc. No. 214], Class 19 (General Unsecured Creditors) ranges from approximately \$300,000.00 to \$1,226,186.88. Class 19's wide range is due to City National Bank's claim (Claim 16) in the amount of \$926,186.88. As the Debtor disputes City National Bank's claim and plans to file an objection, the claim may be disallowed. The Court notes that granting the Motion with respect to the Claim, which is for \$195,015.00, would likely increase the general unsecured creditor pool, but not to the extent that would render confirmation impossible.

Therefore, the Court finds that granting the Motion and deeming the Claim as being timely filed will not jeopardize the upcoming Confirmation Hearing.

B. The Claim is Deemed as Timely Filed

In a Chapter 11 case, "[t]he Court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed. Notwithstanding the expiration of such time, a proof of claim may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (c)(3), (c)(4), and (c)(6)." Fed. R. Bankr. P. 3003(c)(3). Pursuant to Rule 3002(c)(6), the Court may allow a proof of claim to be filed after the expiration of a claim bar date where "...the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim." Fed. R. Bankr. P. 3002(c)(6).

The Court agrees with the discussion laid out in the Reply with respect to *Maya*. The Court in *Maya* was faced with determining whether a creditor not served with formal notice of a claim bar date in a Chapter 11 case was bound to the confirmation of a debtor's plan of reorganization. Although the situation is not exactly analogous, the *Maya* court's holding that a creditor needs formal notice of a claim bar date in a Chapter 11 bankruptcy case is directly applicable in the instant case. The Debtor must provide formal notice to its creditors, even where a creditor may have constructive

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and/or inquiry notice of the proceedings. *In re Maya Construction Company*, 78 F.3d 1395 (9th Cir. 1996). The *Maya* court noted:

"Generally, if a known contingent creditor is not given formal notice, he is not bound by an order discharging the bankruptcy's obligations. The fact that a creditor has actual knowledge that a Chapter 11 bankruptcy proceeding is going forward involving a debtor does not obviate the need for notice. As the Supreme Court explained in *New York v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 293, 297, 73 S.Ct. 299, 301, 97 L.Ed. 333 (1953):

'Nor can the bar order against New York be sustained because of the city's knowledge that reorganization of the railroad was taking place in the court. The argument is that such knowledge puts a duty on the creditors to inquire for themselves about possible court orders limiting the time for filing claims. But even creditors who have knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred....'"

In re Maya Construction Company, 78 F.3d 1395 (9th Cir. 1996).

The rules governing notice differ between Chapter 7 and Chapter 11 cases. Unlike in Chapter 7, actual notice of a claims bar date is necessary in Chapter 11, as explained above. In Chapter 7, lack of formal notice of a proof of claims deadline is not as significant. *Coastal* involved a claim tardily filed with respect to the distribution of property in a Chapter 7 liquidation. In a Chapter 7 case, a tardily filed claim is entitled to distribution if "... (i) the creditor that holds such claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim under section 501(a) of this title; and (ii) proof of such claim is filed in time to permit payment of such claim." Fed. R. Bankr. P. 726(a)(2)(c). In *Coastal*, notice of the creditors meeting was deemed to be effective notice of the claims bar date, even though the creditor did not receive formal notice of the claims bar date. Therefore, the court ruled that the creditor's actual knowledge of the case barred the tardily filed claim under Rule 726(a)(2)(c). However, the "actual knowledge" standard of Rule 726(a)(2)(c) regarding the allowability of a tardily filed claim only applies in a Chapter 7 liquidation. As Chapter 11 does not have an analogous provision to Rule 726(a)(2)(c), the "actual knowledge" standard does not apply.

As this is a Chapter 11 case, the Movants must be served with actual notice of the

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Bar Date. The Claim may be deemed timely filed because the Debtor failed to serve actual notice of the Bar Date on the Movants, which the Debtor admits to in the Opposition. The Debtor's argument that the Movants had constructive and/or inquiry notice of the case and the Bar Date from Summit's docket is merely speculation and does not fulfill the requirement of actual notice in a Chapter 11 case. The Court has only received testimony of the Movants, attached as the Declaration of Robert Abbasi to the Motion, which states: "I did not know about the Debtor's individual bankruptcy case and claims bar date until March 2023. I never received mail or other notice of the claims bar date from the Debtor." Therefore, as the Movants were not served with actual notice of the Bar Date, the Court finds it appropriate to deem the Claim as being timely filed.

As expressed in the Reply, the issue of excusable neglect raised in the Opposition is irrelevant at this stage. The Movants are not required to show excusable neglect or the related issues (*e.g.*, lack of prejudice to the Debtor). The Debtor's failure to serve actual notice of the Bar Date on the Movants suffices to deem the Claim as being timely filed.

III. Conclusion

Based upon the foregoing, the Opposition is **OVERRULED** and the Motion is **GRANTED**. The Claim shall be treated as a timely filed general unsecured claim. Within seven days of the hearing, the Movants shall submit an order incorporating this tentative ruling by reference.

No appearance is required if submitting on the Court's tentative ruling. If you intend to submit on the tentative ruling, please contact Evan Hacker or Daniel Koontz at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the Court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Party Information

Debtor(s):

Moussa Moradieh Kashani

Represented By
Sandford L. Frey
Robyn B Sokol

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2:22-15985 Francisco J. Ortega and Snizhana Ortega

Chapter 11

#3.00 HearingRE: [33] U.S. Trustee Motion to dismiss or convert or appoint a chapter 11 trustee . (Attachments: # 1 COS)(united states trustee (hy))

Docket 33

Tentative Ruling:

5/1/2023

Note: Parties may appear at the hearing either in-person or by telephone. The use of face masks in the courtroom is optional. Parties electing to appear by telephone should contact CourtCall at 888-882-6878 no later than one hour before the hearing.

The Debtors shall appear to inform the Court as to whether they wish to continue to prosecute the case.

Pleadings Filed and Reviewed:

- 1) United States Trustee's Notice of Motion and Motion Under 11 U.S.C. § 1112(b) to Dismiss, Convert, or Direct the Appointment of a Chapter 11 Trustee [Doc. No. 33] (the "Motion to Dismiss")
- 2) Non-Opposition to United States Trustee's Request for Dismissal of Chapter 11 Case [Doc. No. 37]
- 3) Status Report [Doc. No. 42]

On November 1, 2022 (the "Petition Date"), Francisco J. Ortega and Snizhana Ortega (the "Debtors") filed a voluntary Chapter 11 petition and elected treatment under Subchapter V. On March 30, 2023, the United States Trustee (the "UST") filed a motion to dismiss the case [Doc. No. 33] (the "Motion to Dismiss"), based upon the Debtors' failure to file any Monthly Operating Reports since the commencement of the case. On April 11, 2023, the Debtors filed a response to the Motion to Dismiss, in which they requested dismissal of the case. However, on April 21, 2023, the Debtors filed Monthly Operating Reports for the months of November 2022 through and including February 2023. The Debtors also filed a Subchapter V Status Report on April 25, 2023. It is unclear from the Status Report whether the Debtors wish to

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continue to prosecute the case. For example, the Status Reports states that "the instant status hearing may become moot" in view of the UST's Motion to Dismiss.

The Debtors shall appear to inform the Court as to whether they wish to continue to prosecute the case. In the event that the Debtors do wish to continue to prosecute the case, the Court will enter a continuing compliance order in favor of the UST.

Party Information

Debtor(s):

Francisco J. Ortega

Represented By
Jeffrey S Shinbrot

Joint Debtor(s):

Snizhana Ortega

Represented By
Jeffrey S Shinbrot

Trustee(s):

Gregory Kent Jones (TR)

Pro Se

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11:00 AM

2:22-14858 Mylife.com Inc.

Chapter 11

Adv#: 2:23-01094 United States Of America v. Mylife.com Inc.

#100.00 HearingRE: [15] Motion to Dismiss Adversary Proceeding

Docket 15

Tentative Ruling:

5/1/2023

Note: Parties may appear at the hearing either in-person or by telephone. The use of face masks in the courtroom is optional. Parties electing to appear by telephone should contact CourtCall at 888-882-6878 no later than one hour before the hearing.

For the reasons set forth below, the Debtor's Motion to Dismiss is **DENIED**.

Pleadings Filed and Reviewed:

- 1) The United States of America's Complaint to Determine that its Debt is Excepted from Discharge Under 11 U.S.C. § 1141(d)(6)(A) [Adv. Doc. No. 1] (the "Complaint")
- 2) Motion to Dismiss Adversary Proceeding and Complaint to Determine that Debt is Excepted from Discharge [Adv. Doc. No. 15] (the "Motion to Dismiss")
- 3) The United States of America's Response in Opposition to Defendant's Motion to Dismiss Adversary Proceeding and Complaint [Adv. Doc. No. 18] (the "Opposition")
- 4) Reply in Support of Motion to Dismiss Adversary Proceeding and Complaint to Determine that Debt is Excepted from Discharge [Adv. Doc. No. 29]

I. Facts and Summary of Pleadings

On September 2, 2022 (the "Petition Date"), Mylife.com Inc. (the "Debtor") filed a voluntary Chapter 11 petition. Jeffrey Tinsley ("Tinsley") is the Debtor's CEO and holds a 49% interest in the Debtor. The Debtor operates a website that allows subscribers to run background checks on individuals.

On July 27, 2020 (prior to the Petition Date), the United States of America (the "United States") filed a complaint against the Debtor and Tinsley in the District Court

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(the "District Court Complaint"), seeking relief for (1) deceptive business practices in violation of § 5(a) of the Federal Trade Commission Act (the "FTC Act"), 15 U.S.C. § 45(a), (2) violation of the Telemarketing Sales Rule (the "TSR"), 16 C.F.R. § 310.3(a)(1)–(2), and (3) violation of the Restore Online Shoppers Confidence Act ("ROSCA"), 15 U.S.C. § 8403 (collectively, the "Consumer Protection Statutes"). *See* Case No. 2:20-cv-6692-JFW (Central District of California) (the "District Court Action").

On October 19, 2021, the District Court entered summary judgment in favor of the United States. The District Court found that the Debtor had violated the Consumer Protection Statutes by, among other things, (1) maintaining a website that was likely to mislead consumers in violation of § 5 of the FTC Act, (2) violating the TSR by making misleading telemarketing calls to consumers, and (3) violating ROSCA by failing to provide customers simple mechanisms to stop recurring credit-card charges.

On December 15, 2021, the District Court approved a *Stipulated Order for Permanent Injunction and Equitable Monetary Relief* [Complaint, Ex. C] (the "Stipulated Order") entered into between the United States, on the one hand, and Tinsley and the Debtor, on the other hand. The Stipulated Order provided in relevant part:

The facts alleged in the Complaint shall be taken as true, without further proof, in any subsequent civil litigation by or on behalf of the Commission, including in a proceeding to enforce its rights to any payment or monetary judgment pursuant to this Order, such as a nondischargeability complaint in any bankruptcy case.

The facts alleged in the Complaint establish all elements necessary to sustain an action by the Commission pursuant to Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A), and this Order will have collateral estoppel effect for such purposes.

Stipulated Order at § VIII(B)–(C).

The Stipulated Order further stated that "Defendants waive all rights to appeal or otherwise challenge or contest the validity of this Order." *Id.* at "Findings," ¶ 5. It also stated that "Defendants neither admit nor deny any of the allegations in the Complaint, except as specifically stated in their answer to the Complaint." *Id.* at "Findings," ¶ 3.

The Stipulated Order entered a monetary judgment of \$28,945,968 against the Debtor to be paid to the United States (the "Stipulated Judgment"), and contained a

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schedule for payment of the Stipulated Judgment. The Debtor made only two payments under the payment schedule, in the total amount of \$3,166,666.66.

On March 6, 2023, the United States filed a *Complaint to Determine that its Debt is Excepted from Discharge Under 11 U.S.C. § 1141(d)(6)(A)* [Adv. Doc. No. 1] (the "Complaint") against the Debtor. The Complaint seeks declaratory judgment under 28 U.S.C. § 2201(a) declaring that the Stipulated Judgment is excepted from discharge under §§ 1141(d)(6)(A) and 523(a)(2)(A).

Summary of Papers Filed in Connection with the Debtor's Motion to Dismiss

The Debtor moves to dismiss the Complaint for failure to state a claim upon which relief can be granted under Civil Rule 12(b)(6). It argues that the Stipulated Judgment falls outside the scope of § 523(a)(2)(A), because it is payable to the United States, not to the victims of the Debtor's misconduct. It further argues that the Complaint's allegations are not pleaded with the particularity required by Civil Rule 9. Finally, the Debtor argues that to the extent the Stipulated Judgment contains a pre-petition waiver of the Debtor's discharge, such waiver is unenforceable as a violation of public policy.

The United States opposes the Motion to Dismiss. It cites *FTC v. Lake*, 647 B.R. 213, 224 (Bankr. C.D. Cal. 2022) for the proposition that the Stipulated Judgment is non-dischargeable even though it is payable to the United States, rather than to the victims of the Debtor's misconduct. It distinguishes the cases cited by the Debtor holding that a pre-petition waiver of the Debtor's discharge are unenforceable by noting that those cases involved individuals, as opposed to corporations.

II. Findings and Conclusions

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations omitted). To state a plausible claim for relief, a complaint must satisfy two working principles:

First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitations of the elements of a cause of action, supported by mere conclusory statements, do not suffice.... Second, only a complaint that states a plausible claim for relief

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survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief."

Id. (citing Civil Rule 8(a)(2)).

Although the pleading standard Civil Rule 8 announces "does not require 'detailed factual allegations,' ... it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.... A pleading that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

The Complaint States a Claim Under §§ 1141(d)(6)(A) and 523(a)(2)(A)

Section 1141(d)(6)(A) provides that "the confirmation of a plan does not discharge a debtor that is a corporation from any debt of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit"

Section 523(a)(2)(A) provides: "A discharge under section 727 ... of this title does not discharge an individual debtor from any debt for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition."

To prevail on a § 523(a)(2)(A) claim, a creditor must prove that:

- 1) the debtor made the representations;
- 2) that at the time he knew they were false;
- 3) that he made them with the intention and purpose of deceiving the creditor;
- 4) that the creditor relied on such representations; and
- 5) that the creditor sustained the alleged loss and damage as the proximate result of the misrepresentations having been made.

In re Sabban, 600 F.3d 1219, 1222 (9th Cir. 2010).

Claims for relief under §523(a)(2)(A) involve allegations of fraud, and therefore must be pleaded with particularity in accordance with the requirements of Civil Rule

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9(b). To satisfy Civil Rule 9(b), allegations of fraud must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.' A pleading 'is sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations.' The complaint must specify such facts as the times, dates, places, benefits received, and other details of the alleged fraudulent activity." *Neubronner v. Milken*, 6 F.3d 666, 671–72 (9th Cir. 1993); *see also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) ("Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged.").

1. The Fact that the Stipulated Judgment is Payable to the United States Does Not Place the Stipulated Judgment Outside the Scope of § 523(a)(2)(A)

The fact that the Stipulated Judgment is payable to the United States, as opposed to the victims of the Debtor's misconduct, does not place the Stipulated Judgment outside the scope of § 523(a)(2)(A). Multiple cases decided within the Ninth Circuit have held that judgments owed to the United States arising from the debtor's violation of various consumer protection statutes are non-dischargeable under § 523(a)(2)(A). *See, e.g., Fed. Trade Comm'n v. Lake*, 647 B.R. 213 (C.D. Cal. 2022) (holding that judgment arising from debtor's violations of the Mortgage Assistance Relief Services Rule and Telemarketing Services Rule was non-dischargeable under § 523(a)(2)(A)); *Fed. Trade Comm'n v. Gugliuzza (In re Gugliuzza)*, 527 B.R. 370, 373 (C.D. Cal. 2015) (holding that judgment arising from debtor's violation of § 5 of the FTC Act was potentially non-dischargeable).

The Stipulated Judgment falls within the scope of § 523(a)(2)(A) even though it is payable to the United States, rather than to the victims of the Debtor's misconduct. As explained by one court:

[T]o be nondischargeable, the debt need not be owed, either in whole or part, to a victim of the fraud, or represent compensation to such a victim. For example, in *Pleasants v. Kendrick (In re Pleasants)*, 219 F.3d 372, 375 (4th Cir. 2000), the debtor, Pleasants, had falsely held himself out as a licensed architect and bungled the job for which the creditor, Kendrick, had contracted with him. Kendrick brought a suit for damages; Pleasants then filed for bankruptcy. Pleasants argued that Kendrick's claim against him did not fall under § 523(a)(2)(A), because that provision "requires that some portion of a

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creditor's claim must have been directly transferred from the creditor to the debtor," but "the [creditor's] claim included only amounts paid by the [creditor] to third parties, such as payments to the architect and builder hired to correct and complete the project." *Id.* The Fourth Circuit, however, held that the formulation and analysis in *Cohen* "is broad enough to encompass a situation in which no portion of a creditor's claim was literally transferred to the fraudulent debtor." *Id.* (quoting *Cohen*, 523 U.S. at 215, 118 S.Ct. 1212 ("We hold that § 523(a)(2)(A) prevents the discharge of *all liability arising from fraud.*" (emphasis in original)), and *id.* at 218, 118 S.Ct. 1212 (§ 523(a)(2)(A) bars "discharge of debts 'resulting from' or 'traceable to' fraud" (quoting *Field*, 516 U.S. at 61, 64, 116 S.Ct. 437)). *See also Hatfield v. Thompson*, 555 B.R. 1, 12 (B.A.P. 10th Cir. 2016) ("[T]here is no requirement that the debt be for something the debtor obtains from the creditor.").

The FCC Penalty here similarly falls within the scope of the § 523(a)(2)(A) exemption, given the breadth of the Supreme Court's construction and description of the exemption in *Cohen*. Although the United States—the creditor as to the FCC Penalty—was not among the victims of Birch's fraud, and although that penalty is on top of the sums needed to make the victims (consumers) whole, those features of the penalty do not prevent the exemption from applying. *Cohen* made that clear, in holding exempt from discharge both the treble damages award and the award of attorney's fees and costs owed by the debtor, and in noting that liabilities exempted from discharge under § 523(a)(2)(A) "may exceed the value obtained by the debtor." 523 U.S. at 223, 118 S.Ct. 1212.

United States v. Fusion Connect, Inc. (In re Fusion Connect, Inc.), 634 B.R. 22, 31 (S.D.N.Y. 2021).

The Debtor cites an unpublished decision, *TK Holdings Inc. v. Hawai'i (In re TK Holdings Inc.)*, Nos. 17-11375 (BLS), 17-51886 (BLS), 2018 Bankr. LEXIS 414, at *20 (Bankr. D. Del. Feb. 14, 2018), for the proposition that the Stipulated Judgment is non-dischargeable. The *TK Holdings* court reasoned that a penalty payable to a government for violation of consumer protection statutes did not fall within the scope of § 523(a)(2): "Where the governmental unit is the actual victim of a corporate debtor's fraudulent conduct or representations, Congress has precluded a discharge. But if the fraud is perpetrated not upon the government but on citizens and consumers, the requirements of § 523(a)(2) are not satisfied." *Id.*

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The Court finds the reasoning of *In re Fusion Connect* to be more persuasive than that of *TK Holdings*, and declines to follow *TK Holdings*. The Court notes that if it were to follow *TK Holdings*, corporate debtors would almost always be able to discharge judgments entered against them for violating consumer protection statutes. This would make bankruptcy courts a haven for corporations who have been found responsible for defrauding consumers.

2. The Debtor is Not Entitled to Dismissal of the Complaint on the Ground that the Stipulated Judgment is Void as a Prepetition Waiver of the Debtor's Discharge

The Debtor argues that the Complaint fails to state a claim because the Stipulated Judgment constitutes an unenforceable pre-petition waiver of the Debtor's discharge. The issue of the enforceability of the Stipulated Judgment's provisions regarding discharge is more appropriately determined in connection with the United States' Motion for Summary Judgment, which is set for hearing on May 31, 2023. The Debtor may renew its arguments with respect to the issue at that hearing.

3. The Complaint's Allegations of Fraud Are Pleaded With Sufficient Particularity

The Debtor argues that the Complaint's allegations of fraud are not pleaded with sufficient particularity, because the Complaint does contain factual allegations regarding the specific instances in which the Debtor defrauded various consumers. However, where, as here, the underlying debt is established by a judgment in favor of a government entity, it is not necessary for a complaint to contain such allegations in order to state a claim under § 523(a)(2)(A). In *Gugliuzza*, the court held that in order to obtain a finding that a judgment for violation of consumer protection statutes was non-dischargeable, the government was *not* required to provide "proof of reliance [upon the debtor's misrepresentations] by every individual consumer" *Gugliuzza*, 527 B.R. at 378. Requiring such proof, the *Gugliuzza* court held, "would undermine the FTC Act's purpose of preventing widespread consumer fraud" and "would be entirely inconsistent with the Bankruptcy Code's core principles." *Id.*

Gugliuzza's reasoning applies with equal force here. Requiring the Complaint to contain detailed factual allegations with respect to each instance of consumer fraud engaged in by the Debtor would defeat the purposes of the Consumer Protection Statutes and run counter to fundamental principles of the Bankruptcy Court. The Complaint's allegations of fraud are pleaded with sufficient particularity.

III. Conclusion

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Based upon the foregoing, the Motion to Dismiss is **DENIED**. The Debtor shall file an Answer to the Complaint within fourteen days of this hearing. The Court will prepare and enter an order denying the Motion to Dismiss.

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Evan Hacker or Daniel Koontz, the Judge's Law Clerks, at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Party Information

Debtor(s):

Mylife.com Inc.

Represented By
Leslie A Cohen

Defendant(s):

Mylife.com Inc.

Represented By
Leslie A Cohen

Plaintiff(s):

United States Of America

Represented By
Leah Victoria Lerman
Christopher VanDeusen